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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

ACS of Fairbanks, Inc.

Petition for Declaratory Ruling  
and Other Relief Pursuant to Section 254(e)  
of the Communications Act

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

PETITION FOR DECLARATORY RULING AND OTHER RELIEF

ACS OF FAIRBANKS, INC.

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July 24, 2002

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## SUMMARY

ACS of Fairbanks ("ACS-F") is a rural incumbent local exchange carrier ("ILEC") in Fairbanks, Alaska. Through this Petition, ACS-F informs the Commission of the unlawful misuse of universal service rural carrier cost recovery mechanisms that is occurring in Fairbanks and, potentially, throughout the United States, and asserts that the Commission must immediately cease payments of universal service to entities that are unlawfully receiving universal service funds.

Section 254(e) of the Communications Act of 1934, as amended, (the "Act") and Section 54.7 of the Commission's rules require that a carrier that receives universal service funds use that support only for the "provision, maintenance, and upgrading of facilities and services for which that support was intended." The Commission has determined that only rural local exchange carriers with loop costs in excess of approximately \$23.00 per month are eligible for federal high-cost loop support ("HCLS"). ACS-F's average cost per line per month is \$33.51 and its lines are, therefore, eligible for universal service HCLS.

ACS-F must lease these same loops to the competitive eligible telecommunications carrier ("CETC") in Fairbanks, General Communication, Inc. ("GCI"), however, at a state-mandated price of \$19.19 per line, per month. At \$19.19, these loops are not high-cost loops, yet GCI receives HCLS pursuant to a Commission rule that allows competing carriers to receive support in the amount for which the ILEC was eligible. 47 C.F.R. § 54.307(a). Because GCI does not *have* high-cost loops, GCI *cannot* be using the HCLS it receives for the purpose for which it is intended – to support high-cost loops. Thus, payment by the Commission through the Universal Service Administrative Company ("USAC") of HCLS to GCI, or to any other CETC, whose loop costs are known not to meet the Commission's standards

for receiving HCLS, violates Section 254(e) of the Act and Section 54.7 of the Commission's rules.

Further, the payment of universal service to CETCs that do not have high-cost loops violates the principle of competitive neutrality. Payment of high-cost funds to CETCs that do not have high-cost loops gives these CETCs a huge competitive advantage, which allows them the flexibility either to earn super-competitive profits or to gain market share by offering services at prices that would be unsustainable in the absence of this subsidy. Neither outcome serves the public interest. Payment of HCLS to CETCs for service over non-high-cost loops sends erroneous market signals, which spurs inefficient entry and confers no long term benefit upon consumers. Moreover, disaggregation of universal service support will not eliminate this problem. When UNE rates are set artificially low, such as in Fairbanks, disaggregation of support would serve only to shift the arbitrage opportunities to higher cost areas where the highest support is available. The competitive advantage for the CETC would remain.

The mere fact that the Commission requires ILECs to provide cost support information as a prerequisite to receive universal service funding, but does not require similar documentation from CETCs, is an additional competitive advantage to CETCs, not only imposing extra costs on ILECs but requiring disclosure of competitive sensitive information. Six years after passage of the Act, the Commission should end the CETCs' free ride. As a prerequisite to receiving universal service, CETCs should be required to provide cost support information to demonstrate that they are eligible to receive universal service funds from HCLS or any of the other universal service high-cost support mechanisms.

As detailed in this Petition, ACS-F requests that the Commission declare that no CETC shall receive interstate high-cost loop support ("HCLS") if its loop costs lie below the

FCC high-cost standard, set at approximately \$23.00 per line per month; and (2) order USAC to suspend any payment of interstate high-cost support to any CETC that does not satisfy the test for high-cost loops established by the Commission. ACS-F submits that, at a minimum, the Commission should declare that, where a CETC's loop costs are known and documented, such as when the CETC purchases unbundled network elements ("UNEs") at a state-sanctioned rate, any HCLS should be based on the CETC's own per-line costs, not on the costs of the ILEC. When the CETC certifies to the state and this Commission that it is using the support for the purpose for which it was intended, as required by Section 254(e), it should be required to justify the level of support it receives by substantiating that its loop costs meet the threshold standard for high-cost loops established by the Commission. Further, ACS-F requests that the Commission order USAC to immediately suspend HCLS payments to GCI and any other CETC that buys UNE loops until such carrier establishes that HCLS payments are not being used in violation of Section 254(e) of the Act. Ultimately, the Commission should not pay any universal service support to carriers who fail to demonstrate that the support is being used "for the provision, maintenance and upgrading of facilities and services for which that support was intended." *See* 47 U.S.C. § 254(e).

ACS of Fairbanks, Inc. )  
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Pursuant to Section 254(e) of the Communications Act of 1934, as amended (“the Act”)<sup>1</sup> and Sections 1.1 and 1.2 of the Commission’s rules,<sup>2</sup> and in accordance with Section 5(d) of the Administrative Procedure Act,<sup>3</sup> ACS of Fairbanks, Inc. (“ACS-F”),<sup>4</sup> by its attorneys, hereby petitions the Commission (also referred to herein as “FCC”) to: (1) declare that no competitive eligible telecommunications carrier (“CETC”) shall receive interstate high-cost loop support (“HCLS”) if its loop costs lie below the FCC high-cost standard, set at approximately \$23.00 per line per month; and (2) order the Universal Service Administrative Company (“USAC”) to suspend any payment of interstate high-cost support to any CETC that does not satisfy the test for high-cost loops established by the Commission. In particular, the ACS-F requests that the Commission order USAC to immediately suspend payments of HCLS to any CETC that provides service through lease of unbundled network elements (“UNEs”), and whose UNE costs are below this \$23.00 threshold.

<sup>4</sup> ACS-F is a rural telephone company within the meaning of the Act, and is a wholly owned subsidiary of Alaska Communications Systems Group, Inc.

## **I. FIERCE COMPETITION AND REGULATORY ARBITRAGE IN FAIRBANKS, ALASKA**

ACS-F is an incumbent local exchange carrier ("ILEC"), which operates local exchange facilities serving approximately 38,000 customers in Fairbanks, Alaska and surrounding rural areas.<sup>5</sup> Despite the many logistical and technical issues surrounding provision of telecommunications services in rural Alaska, the Alaska market has become the most fiercely competitive in the country.

ACS-F faces its most formidable competition from General Communication, Inc. ("GCI"), the incumbent cable television provider in Fairbanks and throughout the majority of Alaska. GCI's cable television systems serve approximately 130,000 subscribers, approximately 90 percent of all Alaska households, and its cable plant passes 191,000 homes.<sup>6</sup> In addition to its cable television facilities, GCI self-provisions approximately 2,000 lines in Fairbanks, including 1,200 access lines initially provisioned by GCI to its collocated ISP affiliate, and also furnishes local exchange service over UNE loops leased from ACS-F.<sup>7</sup> GCI began providing local exchange service in Fairbanks in the fall of 2001, and its growth in market share of the Fairbanks local telephone market has been staggering. In its first nine months of operation, through May 2002, GCI already garnered a 17 percent market share.<sup>8</sup> GCI, however, is winning market share in Fairbanks based in large part on regulatory arbitrage, which is the basis of this Petition.

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<sup>5</sup> *Affidavit of Stephen A. Pratt*, at ¶ 3 ("*Pratt Affidavit*") (attached as Exhibit A.)

<sup>6</sup> *State & Local Actions*, WARREN'S CABLE REGULATION MONITOR (November 26, 2001).

<sup>7</sup> *Pratt Affidavit*, at ¶ 3.

<sup>8</sup> *Id.* ACS-F understands that competitive local exchange carriers ("CLECs") typically gain market share through wireless revenues or second lines. In Fairbanks, however, GCI is utilizing its universal service windfall to gain market share predominantly through primary lines.



The regulatory arbitrage stems from the Commission's rule that states that a competitive eligible telecommunications carrier ("CETC"), such as GCI, shall receive federal HCLS<sup>9</sup> for each line it serves in a particular wire center based on the support the ILEC would be entitled to receive for each line.<sup>10</sup> The FCC has held that only local exchange carriers with loop costs in excess of approximately \$23.00 per month are to be considered eligible for federal HCLS.<sup>11</sup> Although ACS-F is eligible for HCLS based on its per-line costs of \$33.51 per month,<sup>12</sup> ACS-F must lease UNE loops to GCI at a deeply discounted rate of \$19.19 per month, as set by the Regulatory Commission of Alaska ("RCA").<sup>13</sup> As such, at \$19.19, competitors of ACS-F lease non-high-cost loops,<sup>14</sup> but still receive high-cost loop support.<sup>15</sup>

<sup>9</sup> As used in this Petition, "high-cost loop support" or "HCLS" refers to the rural high-cost loop support mechanism formerly known as "universal service fund." Although this Petition focuses on unlawful payments of HCLS, ACS-F further Petitions that the Commission require CETCs to provide cost documentation as a prerequisite for receipt of funds from any federal high-cost universal service mechanisms. *See* discussion, *infra*, pp. 36-37.

<sup>10</sup> 47 C.F.R. § 54.307(a).

<sup>11</sup> Moreover, due to limitations in fund size, USAC has determined that the threshold today for obtaining high-cost loop support is even higher, approximately \$25.25. *See, infra*, note 31.

<sup>12</sup> *Affidavit of Thomas R. Meade*, at ¶ 7 ("Meade Affidavit") (attached as Exhibit B).

<sup>13</sup> *See Petition by GCI Communications Corp. d/b/a General Communication, Inc., and d/b/a GCI for Arbitration with PTI Communications of Alaska, Inc., under 47 U.S.C. §§ 251 and 252 for the Purpose of Instituting Local Competition, Petition by GCI Communications Corp. d/b/a General Communication, Inc., and d/b/a GCI for Arbitration with Telephone Utilities of Alaska, Inc., under 47 U.S.C. §§ 251 and 252 for the Purpose of Instituting Local Competition, Petition by GCI Communications Corp. d/b/a General Communication, Inc., and d/b/a GCI for Arbitration with Telephone Utilities of the Northland, Inc., under 47 U.S.C. §§ 251 and 252 for the Purpose of Instituting Local Competition*, 2000 Alas. PUC LEXIS 382 (Aug. 24, 2000); *Interconnection and Resale Agreement Between ACS of Fairbanks, Inc. and GCI Communication Corp.*, entered into Sept. 3, 2000, at Part C – Attachment 1, Table 1 (publicly available from the RCA).

<sup>14</sup> It is possible that a CETC may add facilities to the UNE loops that it leases, but any effect of such loop investment on reportable costs would likely be negligible. *See Meade Affidavit*, at ¶¶ 7-9 (discussing the example of GCI's costs in Fairbanks).

This payment of universal service HCLS for operation of non-high-cost lines is unlawful under Section 254(e) of the Act which requires, in pertinent part, that a carrier that receives federal universal service support use that support only for the provision, maintenance and upgrading of facilities and services for which that support is intended.<sup>16</sup> The FCC's rules set forth the same restriction.<sup>17</sup> The FCC implements Section 254(e), in part, by requiring states to certify to the Commission that carriers within the state use federal support consistent with the funds' intended purpose.<sup>18</sup> Therefore, the states have a responsibility to be vigilant in ensuring that funds are used properly.<sup>19</sup> Such vigilance, however, is not practiced by the RCA, which does not review CETC costs when it makes this certification.<sup>20</sup> Consequently, in Alaska, allowing the CETC to receive the same support as the ILEC is a rule that can and does produce absurd and improper results. Section 54.307(a) can result in huge windfalls for CETCs, which, by definition, means the funds are not being used for the purposes for which they were intended. Such misuse violates the principle of competitive neutrality as well as Section 254(e) of the Act

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<sup>15</sup> Although this Petition focuses on the current situation in Fairbanks, ACS-F asserts that this unlawful payment of high-cost loop funds to support non-high-cost loops could occur in other markets in Alaska as well as throughout the United States.

<sup>16</sup> 47 U.S.C. § 254(e).

<sup>17</sup> 47 C.F.R. § 54.7.

<sup>18</sup> *Id.* § 54.313 (certification requirement for non-rural carriers); §54.314 (certification requirement for rural carriers).

<sup>19</sup> As RCA Commissioner Nanette Thompson recently recognized, "... I think states have an important role in assuring accountability for use of universal service monies. That's something that the FCC recently has, under the terms of the high-cost fund, given states that responsibility, and I think that we have an important role to play in terms of the other programs as well." Testimony of Nanette Thompson, Chair, Alaska Public Utilities Commission, before the United States Senate Communications Subcommittee Hearing on the Future of Universal Service: Ensuring the Sufficiency and Stability of the Fund (June 19, 2002).

<sup>20</sup> See discussion, *infra*, pp. 17-18.

and Section 54.7 of the FCC's rules.<sup>21</sup> Because GCI does not *have* high-cost loops, as defined by the FCC, GCI perforce is unlawfully using universal service HCLS for a purpose other than to purchase, maintain or upgrade high-cost loops, or to provide supported services to subscribers in high-cost areas.

In addition, the current rule fails to promote efficient competition, but instead allows for inefficient carriers to enter the market and compete based on these unlawful subsidies. This result disserves the public interest and violates the Act. Further, as explained below, disaggregation of support would not solve this problem, but would only shift CETC arbitrage opportunities to the higher cost areas where the greatest amount of universal service support would be available.<sup>22</sup> Thus, the Commission should act to immediately end this unlawful misuse of the rural cost recovery mechanism, and require that CETCs receive universal service funding based on their own costs, and not on the costs of the ILEC.

## **II. INTERSTATE HIGH-COST SUPPORT IS UNLAWFULLY FUNDING LOW-COST LOOPS IN ALASKA**

### **A. Background on Federal High-Cost Support**

Five federal universal service mechanisms currently provide support to rural carriers: (1) HCLS (formerly, the "universal service fund"), (2) Long Term Support ("LTS"),<sup>23</sup> (3) Local Switching Support ("LSS"),<sup>24</sup> (4) for price cap companies or competitive carriers operating in the service area of a price cap company, Interstate Access Support ("IAS")<sup>25</sup> and (5)

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<sup>21</sup> 47 U.S.C. § 254(e); 47 C.F.R. § 54.7.

<sup>22</sup> *See, infra*, pp. 30-32.

<sup>23</sup> LTS provides support for interstate loop costs to rate-of-return carriers that participate in the NECA common line pool. 47 C.F.R. §§ 54.303, 54.311(a).

<sup>24</sup> LSS is available to carriers who service study areas with 50,000 or fewer lines. *Id.* § 54.301.

<sup>25</sup> IAS was established by the Commission to replace implicit support in the interstate access charges of price cap carriers. *See Access Charge Reform, Price Cap Performance Review*

for rate-of-return ILECs and their competitors, Interstate Common Line Support ("ICLS").<sup>26</sup> Section 54.307(a)(2) of the Commission's rules provides that a CETC that uses unbundled ILEC loops to provide competitive local exchange services supported by federal universal service mechanisms "shall receive *the lesser of* the [UNE] price for the loop or the [ILEC's] per-line payment from the high-cost loop support and LTS."<sup>27</sup> Thus, it was not intended that high-cost support would confer a windfall on the CETC if the CETC's UNE costs were lower than the amount of support available to the ILEC (which is based on the ILEC's costs). However, the rule fails to prevent a windfall to the CETC where the CETC's UNE costs equal or exceed the ILEC's per-line high-cost support, but still fall far short of the ILEC's actual loop costs. That omission is what creates the arbitrage opportunity discussed in this Petition.

There are further limitations on the availability of HCLS, however. As determined by the Commission in its *Rural Task Force Order*,<sup>28</sup> a rural ILEC is eligible for HCLS only if its embedded loop costs for a particular study area exceed 115 percent of the national average loop cost, with the actual level of support based on the number of loops served

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*for Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962, ¶¶ 29-35 (2000) ("*Interstate Access Support Order*"), *aff'd in part, rev'd in part, and remanded in part*, *Texas Office of Public Util. Counsel et al. v. FCC*, 265 F.3d 313 (5th Cir. 2001).

<sup>26</sup> ICLS was established by the Commission to replace implicit support in the access rate structure of rate-of-return carriers. See *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 16 FCC Rcd 19613, ¶ 120 (2001) ("*MAG Order*").

<sup>27</sup> 47 C.F.R. § 54.307(a)(2) [emphasis added]. A similar rule limits the amount of LSS available to a CETC that buys switching as a UNE from the ILEC. *Id.*

<sup>28</sup> See *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Report and Order, 16 FCC Rcd 11244, ¶ 11 (2001) ("*Rural Task Force Order*"), *reconsideration denied*, FCC 02-171 (rel. Jun. 13, 2002).

and the degree to which the ILEC's costs exceed the average cost per loop.<sup>29</sup> Based on recommendations from the Rural Task Force and Joint Board on Universal Service ("Joint Board"), the Commission decided to freeze the "national average loop cost" for this purpose at \$240 per year for five years, effective on July 1, 2001.<sup>30</sup> Accordingly, a rural ILEC, whose embedded loop costs exceed 115 percent of \$240 (approximately \$276 per line, per year, or \$23 per month) generally is eligible for HCLS.<sup>31</sup> The embedded loop costs for ACS-F -- \$33.51 per line, per month -- meet this threshold.<sup>32</sup>

As for CETCs, Section 54.307(a) of the FCC's rules provides, "A [CETC] shall receive universal service support to the extent that the [CETC] captures the subscriber lines of an [ILEC] or serves new subscriber lines in the [ILEC's] service area." Subsection (1) of this rule further provides, in pertinent part, "[a CETC] serving loops in the service area of a rural [ILEC] ...shall receive support for each line it serves in a particular service area based on the support the [ILEC] would receive for each such line, disaggregated by cost zone if disaggregation zones

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<sup>29</sup> 47 C.F.R. § 36.631.

<sup>30</sup> *Id.* § 36.622(a); *Rural Task Force Order*, at ¶ 56. Because the national average loop rate had varied little in the previous four years, the Commission found that the specificity and predictability provided by a frozen national average loop cost would outweigh any potential distortions that might occur over the five-year period of the plan. *Id.* ¶ 57. The Commission also promised to revisit the issue if the actual national average loop cost experiences significant increases or reductions during the life of the plan. *Id.* ¶ 58. In addition, because the high-cost loop support fund is subject to an indexed cap, if the sum of the actual high-cost loop support nationwide exceeds the indexed cap, under Section 36.622 of the Commission's rules NECA will increase the amount of the national average loop cost in order to ensure that the total amount of high-cost loop support disbursed does not exceed this cap. *Id.*

<sup>31</sup> As noted above, today, the threshold is actually \$25.25. Due to the Commission's cap on growth of the fund, USAC has determined that the rural average cost per line is \$263.45 per year. See Letter from Sue Barrett, Director, National Exchange Carrier Association to Tom Meade, Alaska Communications Systems (May 10, 2002) (Attached as Exhibit III to the *Meade Affidavit*). Thus, in Fairbanks, only loops with costs in excess of 115 percent of \$263.45 (\$302.97 per line per year or \$25.25 per month) will be eligible for HCLS in 2002.

<sup>32</sup> *Meade Affidavit*, at ¶¶ 6, 7.

have been established within the service.”<sup>33</sup> Enforcing Section 54.307, without regard to whether the CETC actually has costs above 115 percent of the national average, can and does result in a violation of Section 54.7 of the FCC’s rules and Section 254(e) of the Act.

**B. Current Implementation of the High-Cost Fund Leads to Anti-Competitive, Unlawful Results in Fairbanks**

The Fairbanks study area, like many rural study areas, is far from homogeneous. Although the city of Fairbanks has a relatively densely populated downtown area with about 17,000 local telephone customers, the study area also encompasses extremely rural areas, in which about 27,500 isolated homes and businesses are located many miles from the population center.<sup>34</sup> Extremes of Alaska climate and geography make reaching consumers living in this rural setting even more difficult. The cost of serving each customer varies widely. For example, monthly loop costs range from approximately \$12.61 per line in the downtown Fairbanks area to \$309.79 per line in the most rural parts of the study area.<sup>35</sup> From this range, NECA calculated ACS-F’s average loop cost to be \$33.51.<sup>36</sup> Notwithstanding ACS-F’s costs, the RCA set the price at which GCI purchases unbundled loops in Fairbanks at \$19.19 per loop per month.<sup>37</sup> Therefore, by order of the RCA, when GCI purchases its UNE loops, it does so at rates below the FCC’s \$23.00 high-cost loop threshold.

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<sup>33</sup> 47 C.F.R. § 54.307(a).

<sup>34</sup> ACS of Fairbanks, Inc., *Disaggregation and Targeting Plan*, at 4 (filed May 15, 2001) (“*Disaggregation Plan*”) (the *Disaggregation Plan* was filed with the RCA and copies were sent to USAC and NECA).

<sup>35</sup> *Id.*

<sup>36</sup> See *Meade Affidavit*, at ¶ 7 (stating that the average cost per loop, per year as calculated by NECA is \$402.13).

<sup>37</sup> ACS is separately challenging these rates on a number of bases as confiscatory and not cost based. Alaska Communications Systems, *Emergency Petition for Declaratory Ruling and Other Relief* (filed Jul. 24, 2002).

As depicted in *Figure 1*, below, based on its costs, ACS-F currently receives interstate high-cost support for its loops as follows: (1) HCLS of approximately \$5.32 per line per month; (2) LTS of \$1.89 per line per month; and (3) \$2.19 of ICLS.<sup>38</sup> In all, ACS-F expects to receive approximately \$9.40 per line, per month in total interstate high-cost support for its loops in 2002.<sup>39</sup>

Under the Commission's rules, each CETC that wins a customer from ACS-F is entitled to receive the exact same level of support as ACS-F for each line the CETC serves in the Fairbanks study area, up to the UNE price. GCI currently is eligible for \$9.40 per line per month in interstate high-cost support<sup>40</sup> even though its loop costs are much lower than those of ACS-F (because of the \$19.19 UNE price adopted by the RCA) and, in fact, lower than the Commission's own standard for receiving high-cost loop support. As explained by Thomas R. Meade in his attached affidavit, the \$19.19 total per loop cost includes all significant costs that would be eligible for HCLS, as calculated pursuant to the Commission's rules.<sup>41</sup> Using this same cost accounting methodology, ACS-F, as the carrier of last resort, continues to have \$33.51

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<sup>38</sup> *Mead Affidavit*, at ¶ 3

<sup>39</sup> This Petition seeks immediate action from the Commission to cease payments of HCLS to CETCs because: (1) the Commission has set a \$23.00 threshold for HCLS eligibility; and (2) GCI's UNE rates are known and irrefutably demonstrate that GCI does not meet this dollar threshold. However, ACS also petitions that the Commission review payments of all universal service high-cost mechanisms, including LTS, LSS, and ICLS, to ensure that high-cost support is targeted only to CETCs that provide documentation of their costs. *See, infra*, pp. 33-37.

<sup>40</sup> *Meade Affidavit*, at ¶ 2. The \$9.40 includes HCLS, LTS, and ICLS.

<sup>41</sup> *Id.* ¶¶ 7-9. In his affidavit, Mr. Meade recognizes that GCI could add facilities to the ACS-F UNE loops, but he is unaware of any instance in which GCI has done so as to significantly affect its reportable costs for USF purposes.

in embedded costs to maintain the underlying loop used by GCI, but can no longer fully recover its costs.<sup>42</sup>

There is no justification for GCI to receive this windfall and divert high-cost funds from their intended purpose. Because this support will provide CETCs a lower “cost of goods sold” than ACS-F will ever have – post-support loop cost to GCI of each loop is only \$9.79, versus ACS-F’s post-support cost of \$24.11 – it does violence to the FCC’s stated goal of competitive neutrality and harms consumers by encouraging inefficient entry.<sup>43</sup>

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<sup>42</sup> *Id.* ¶ 7. The Commission’s rules make portable to the CETC the lower of the UNE price *and* the amount of HCLS to which the ILEC was entitled. If the UNE price is lower (which it is not here), the ILEC would still get the difference between that amount and the amount of support it had been eligible to receive. 47 C.F.R. § 54.307(a)(2). Here, GCI receives all the support to which ACS-F would have been entitled. ACS-F does not here challenge the Commission’s decision to make all federal support portable. However, we do note that the Commission has never addressed the ultimate conundrum of making support portable to carriers that do not build alternative facilities, which is the problem of stranded investment of the incumbent carrier. *See Rural Task Force Order*, at n.322 (declining to express opinion on the issue of stranded costs, even though after much contention and failure to reach agreement, the Rural Task Force had recommended that the Commission address the issue) (citing *Rural Task Force*, FCC 00-J4, CC Docket No. 96-45, Recommendation to the Federal-State Joint Board on Universal Service, at ¶ 39 (rel. Sept. 29, 2000) (“*Rural Task Force Recommendation*”)).

<sup>43</sup> This calculation does not include interstate subscriber line charge and state common line access charges that GCI may collect from interexchange carriers. In the case of multi-line business customers, for example, for each \$19.19 UNE loop that GCI leases from ACS-F, GCI may actually collect a total \$26.26 in multi-line business customer loop revenue (HCLS, LTS, ICLS and access charges) *before it charges one cent to the actual customer for providing service*. *See Meade Affidavit*, at ¶ 13.



**Figure 1**  
**COSTS/HIGH-COST SUPPORT PER LOOP, PER MONTH TO SERVE A**  
**CUSTOMER IN FAIRBANKS**

	ACS-F	CETC
Loop Cost	\$33.51	\$19.19
HCLS	- \$5.32	
LTS	- \$1.89	
ICLS	-\$2.19	
Post Loop-Support Costs	\$24.11	\$9.79

**III. ALLOWING CETCS USING LOW-COST LOOPS TO RECEIVE HIGH-COST SUPPORT VIOLATES COMMISSION PRECEDENT AND SECTION 254(E) OF THE ACT**

**A. The Act Requires that Federal Support be Used for the Purpose for Which it Was Intended**

The Act does not contemplate or permit the use of high-cost support by CETCs that do not meet the high-cost standard. In 1996, Congress codified with specificity the Commission's established policy of supporting universal service. Congress recognized that the previous universal service regime, which relied heavily on implicit subsidies through cost-shifting by monopoly local exchange carriers, would become increasingly unsustainable as competition increased under the Act.<sup>44</sup> Therefore, Congress added Section 254 to the Act in

<sup>44</sup> See, e.g., *Federal-State Joint Board on Universal Service; Access Charge Reform*, 14 FCC Rcd. 8078, at ¶¶ 6-7 (1999) (discussing history and purpose of universal service support).

order to establish explicit federal mechanisms to support the delivery of affordable, quality telecommunications services to all Americans.<sup>45</sup>

In the Act, Congress set forth a number of principles upon which universal service policies promulgated by the Commission should be based, including the principle that there “should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”<sup>46</sup> Congress also clearly stated in Section 254(e) of the Act that an eligible telecommunications carrier (“ETC”) receiving federal universal service support “shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended,” further noting that “[a]ny such support should be explicit and sufficient to achieve the purposes of this section.”<sup>47</sup> Section 254(e) “sets standards to prevent waste, windfalls and excessive expense for contributing carriers and their customers.”<sup>48</sup> Each time a CETC, such as CGI, accepts high-cost universal service support for low-cost loops, it violates Section 254(e).

**B. Commission Implementation of the High-Cost Fund Included the Principles of Competitive Neutrality, Targeting Support Where it is Needed, Portability, and Administrative Simplicity**

In May 1997, The Commission began what has been an ongoing effort to implement the new universal service regime mandated by Congress by issuing a *First Report and*

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<sup>45</sup> See 47 U.S.C. § 254(b); Conf. Rep. 104-458, 130-131 (1996), *reprinted in* 1996 U.S.C.C.A.N. 142-144.

<sup>46</sup> 47 U.S.C. § 254(b)(5). The FCC currently is reexamining the meaning of “sufficient” (for non-rural carriers). *Federal-State Joint Board on Universal Service*, Notice Proposed Rulemaking and Order, 17 FCC Rcd 2999 (2002).

<sup>47</sup> 47 U.S.C. § 254(e).

<sup>48</sup> *Rural Task Force Recommendation*, at ¶ 8.

*Order*.<sup>49</sup> Citing Congress's direction and principles in the Act, the Commission stated in the *First Report and Order* that universal service was designed to achieve, *inter alia*, "universal service will be sustainable in a competitive environment; this means both that the system of support must be competitively neutral and permanent, and that all support must be targeted as well as portable among eligible telecommunications carriers."<sup>50</sup> Over the years the Commission has steadily developed numerous policies and standards to carry out its statutory universal service mandate.

### 1. Competitive Neutrality

In its *First Report and Order*, the Commission adopted the principle of "competitive neutrality" in addition to the principles specifically enunciated by Congress in Section 254(b).<sup>51</sup> The Commission defined this principle as follows:

COMPETITIVE NEUTRALITY – Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage or disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.<sup>52</sup>

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<sup>49</sup> *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997) ("*First Report and Order*"), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *aff'd in relevant part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

<sup>50</sup> *First Report and Order*, at ¶ 19 [emphasis added].

<sup>51</sup> *Id.* ¶ 46. Section 254(b)(7) specifically allows the Joint Board and Commission to determine "such other principles as . . . are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act."

<sup>52</sup> *Id.* ¶ 47.

According to the Commission, this explicit recognition of competitive neutrality in implementing the universal support mechanisms is “consistent with congressional intent and necessary to promote ‘a pro-competitive, de-regulatory national policy framework.’”<sup>53</sup>

While noting that it would be extremely difficult to achieve strict competitive neutrality in light of the complexities and diversities of the telecommunications marketplace, the Commission nonetheless emphasized that its universal service decisions “are intended to minimize departures from competitive neutrality . . . so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition . . . .”<sup>54</sup>

## **2. Support Should be Targeted**

The Commission also warned that support must be targeted in a way that will send accurate market signals to competitors.<sup>55</sup> As explained by the Commission, “[t]he purpose of the support is to compensate carriers for serving high-cost customers at below cost prices.”<sup>56</sup> Improperly targeted support contradicts the principle of competitive neutrality. The Commission went so far as to codify the pertinent portion of Section 254(e) in its rules: “A carrier that receives federal universal service support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support was intended.”<sup>57</sup>

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<sup>53</sup> *Id.* ¶ 48 (quoting Joint Explanatory Statement of the Committee of the Conference H.R. Rep. No. 458, 104<sup>th</sup> Cong., 2d Sess. at 113).

<sup>54</sup> *Id.* ¶ 48.

<sup>55</sup> *See id.* ¶ 19 (“[U]niversal service support will be sustainable in a competitive environment; this means both that the system of support must be competitively neutral and permanent, and that all support must be targeted as well as portable among eligible telecommunications carriers”). *See also id.* ¶ 292 (“[W]e conclude that the 1996 Act’s mandate to foster competition in the provision of telecommunications services in all areas of the country and the principle of competitive neutrality compel us to implement support mechanisms that will send accurate market signals to competitors.”).

<sup>56</sup> *Id.* ¶ 290.

<sup>57</sup> 47 C.F.R. § 54.7.

Payment of HCLS based on ILEC's costs, not the CETC's, creates a windfall to CETCs and skews market signals in a way that any competition that does arise – such as in the Fairbanks study area – is based not so much on rational economic decisions as on regulatory gaming.

### 3. Portability of Support

The Commission further determined to make payments to carriers portable “[i]n order not to discourage competition in high cost areas.”<sup>58</sup> The Commission’s stated rationale behind portability is simply to give support to the carrier that incurs the costs of providing service. As explained in the *First Report and Order*, “[w]hen a line is served by an eligible telecommunications carrier, either an ILEC or a CLEC, through the carrier’s owned and constructed facilities, the support flows to the carrier because that carrier is incurring the economic costs of serving that line.”<sup>59</sup> While this rationale clearly does not apply to CETCs using exclusively UNEs, the Commission nonetheless decided to extend portability to such carriers, “in order to avoid creating a competitive disadvantage” for them.<sup>60</sup>

### 4. Administrative Simplicity – Basing Support on the ILEC’s Costs

At the grave expense of the principles of competitive neutrality and sending proper market signals, the Commission also determined to use the amount of support to which the ILEC’s entitled as the basis for support for CETCs.

In the case of rural ILECs, HCLS is based on their unseparated loop cost, and the extent to which it exceeds 115 percent of the national average. When it came to CLECs,

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<sup>58</sup> *First Report and Order* at ¶ 287 (non-rural carriers); ¶ 312 (rural).

<sup>59</sup> *Id.* ¶ 286 (discussion of non-rural carriers); ¶ 311 (rural carriers).

<sup>60</sup> *Id.* ¶ 287 (discussion of non-rural carriers); ¶¶ 311-312 (rural carriers). The Commission therefore ruled that a competitive eligible telecommunications carrier shall receive universal service support to the extent that the competitive eligible communications carrier captures the subscriber lines of an incumbent local exchange carrier (LEC) or serves new subscriber lines in the incumbent LEC’s service area. *Id.* at ¶ 311 (codified at 47 C.F.R. § 54.307(a)).

however, the Commission departed from a cost-based approach, not because it found costs to be irrelevant (to the contrary), but in the name of administrative simplicity. In its *First Recommended Decision*, the Joint Board identified three pieces of information required to calculate the amount of support an ETC may draw from the federal support mechanism: (1) number of subscribers served in the high cost area; (2) cost of providing the supported services to those subscribers; and (3) amount of that cost the carrier recovers from sources other than federal universal support.<sup>61</sup> The FCC's portability rule, however, utterly disregards the second piece of information deemed so crucial, by totally ignoring a CETC's actual cost of providing service.

The Commission clearly noted in its *First Report and Order* that "the CLEC may have costs different from the ILEC."<sup>62</sup> Yet, instead of taking these differences in costs into account, the Commission instead decided to adopt the Joint Board's recommendation to calculate support to all ETCs based on the ILEC's costs. In its *Recommended Decision*, the Joint Board determined that doing so would be "the easiest way to administer the support mechanism."<sup>63</sup> As

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<sup>61</sup> Federal-State Joint Board on Universal Service, CC Docket No. 96-45, *Recommended Decision*, 12 FCC Rcd 87, ¶ 183 (rel. Nov. 8, 1996) ("*Joint Board First Recommended Decision*").

<sup>62</sup> *First Report and Order* at ¶ 289.

<sup>63</sup> *Joint Board First Recommended Decision*, at ¶ 297. The Joint Board made this recommendation based on five assumptions: (1) requiring CLEC to submit cost study using a proxy methodology, without requiring the ILEC's support to be calculated in the same manner, would place one of the carriers at a disadvantage; (2) requiring CLECs to submit cost studies was problematic because CLECs are not required to follow Commission accounting and jurisdictional separations rules, and is thus unlikely to produce information by which a meaningful comparison could be made; (3) CLECs are *expected* to adhere to Section 254(e), which provides that carriers that receives support shall use it "only for the provision, maintenance and upgrading of facilities and services for which the support is intended; (4) Section 254(e) would prohibit CLECs from "cream skimming" or serving only low cost areas; and (5) a CLEC's ability to serve the entire study area at a much lower cost than the incumbent would likely be an indication of a less than efficient operation of the ILEC. *Id.* [emphasis added].

an extension of this, the Joint Board noted concern that the CLECs would be required to adopt special accounting practices to demonstrate their costs to the Commission.<sup>64</sup>

Payment of HCLS, however, cannot continue to be justified using ILEC costs as a proxy for those of a CETC. There can be no question that a CETC fails to comply with Section 254(e) of the Act and the principle of competitive neutrality where the CETC provides service through UNEs that it purchases at prices that do not meet the high-cost loop standard set by this Commission. In such a case the ILEC is inevitably disadvantaged, while looking at the CETC's costs would entail no additional burden: because the CETC's per-line loop cost is the price it pays for UNE loops,<sup>65</sup> which is known to the CETC and publicly available, the CETC would not be required to adopt different accounting practices or endure any burden of evidentiary production. While CETCs that provide service over non-high-cost UNE loops present the most obvious evidence of misuse of high-cost support, ultimately, all CETCs should be required to justify receipt of universal service funding based on their own costs.

The Commission should not ignore hard evidence that some CETCs are not using high-cost support "only for the provision, maintenance and upgrading of facilities and services for which the support is intended." *All carriers seeking federal support should bear the burden to*

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<sup>64</sup> In its deliberations, the Rural Task Force again referred to the administrative burden on CETCs that allegedly would be incurred if support were based on a CETC's own costs rather than the ILECs costs. In posing the question of whether a CETC's support should be based on its own costs, the Rural Task Force concluded in its fifth White Paper that "[s]ince the regulatory reporting requirements vary significantly between ILECs and CETCs, it may be difficult for CETC's [*sic*] to report their own cost data, and it may not be practical to base the level of universal support on each carrier's individual costs." Rural Task Force, "Competition and Universal Service," White Paper 5, at 20 (Sept. 2000), *available at* <http://www.wutc.wa.gov/rtf>. The Rural Task Force did not consider the scenario in which CETCs purchase UNEs at state-mandated prices (and thus, cost data is readily available).

<sup>65</sup> *See Meade Affidavit*, at ¶¶ 7-9 (stating that GCI's cost per line, per month for the purpose of universal service are likely equal to, or do not significantly deviate from, the UNE rate of \$19.19).

demonstrate that they meet the requirements for support. ILECs shoulder the considerable responsibility of establishing that they meet the ETC standards and the other requirements for high-cost support and there is no justification for treating CETCs differently. This is an area in which the RCA has abdicated its responsibility.<sup>66</sup> The RCA has consistently refused to tie GCI's certification as a CETC to any demonstration that its costs of providing service justify receipt of universal service funding.<sup>67</sup> Indeed, in explaining its rationale for certifying to the FCC that GCI will appropriately use federal universal service funds received during 2002, the only explanation that the RCA proffered was the *non sequitur* that "GCI's local rates in competitive areas remain comparable to or lower than the incumbents' . . . ."<sup>68</sup> This Petition demonstrates, however, that the only way for a state to ensure compliance with Section 254(e) is to review a CETC's costs, *not* retail rates, to determine whether a CETC receives a windfall through receipt of universal service. The RCA Chair, Nanette Thompson, recently summed up her position on requiring

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<sup>66</sup> In its most recent refusal to ensure that GCI, the only CETC in Alaska, would use universal service only for the purpose for which it was intended, the RCA stated, "We find it unnecessary to develop statewide guidelines or regulations that are designed for or may apply to only one entity." *Commission Compliance with Federal Requirements to Certify Proper Use of Federal Universal Service Funds by Telecommunications Carriers*, 2002 Alas. PUC LEXIS 114, at \*2 (Apr. 18, 2002).

<sup>67</sup> *Id.*; *Request by GCI Communication Corp. d/b/a General Communication, Inc., and d/b/a GCI for Designation as a Carrier Eligible to Receive Federal Universal Service Support Under the Telecommunications Act of 1996 for Fairbanks, Fort Wainwright, and Juneau*, 2001 Alas. PUC Lexis 446, at \*34-35 (Aug. 28, 2001) ("GCI CETC Order") (refusing to impose reporting requirements on GCI prior to granting GCI CETC status); *Request by GCI Communication Corp. d/b/a General Communication, Inc., and d/b/a GCI for Designation as a Carrier Eligible to Receive Federal Universal Service Support Under the Telecommunications Act of 1996 for Fairbanks, Fort Wainwright, and Juneau*, 2002 Alas. PUC LEXIS 41, at \*11-12 (Feb. 19, 2002) ("GCI CETC Cable Order") (removing condition that universal service not be used to subsidize cable facilities over which local exchange service is provided and declining to require cost support to accompany annual certification).

<sup>68</sup> *In the Matter of the Commission Compliance with Federal Requirements to Certify Proper Use of Federal Universal Service Funds by Telecommunications Carriers*, 2001 Alas. PUC LEXIS 554 (2001), at \*8 (Nov. 13, 2001).



CETC's to justify receipt of universal service based on their own costs, stating, "The prospect of having to learn the costs of CLECs troubles me."<sup>69</sup>

What ought to trouble this Commission is the states' abdication of their responsibility over CETCs' use of federal support under the Act and the FCC's rules. While states do not seem troubled by requiring ILECs (and *not* CLECs) to provide cost support, even though such a policy imposes unique costs on ILECs, and requires them to publicly disclose competitively sensitive information, regulators have ignored CETC abuses under Section 254(e) in the name of administrative simplicity. In the case of a CETC purchasing UNEs, however, it is not even a difficult task to assess the CETC's loop costs: the UNE loop price defines the CETC's costs for loops in the high-cost area. As explained in the *Meade Affidavit*, when a CETC leases a UNE loop, the UNE loop rate represents all costs that the CETC may report under the Commission's Part 36 rules to demonstrate a need for high-cost support.<sup>70</sup> Whatever other mechanisms the Commission may find acceptable for certifying CETCs, for CETCs that purchase UNE loops, it is obvious that their loop cost is readily available information in the public domain that easily and readily addresses the Commission's need to determine whether the CETC has high-cost characteristics and thus is using the support for the purpose for which it was intended.

In addition, as the Commission has recently recognized, as a legal and practical matter, CETCs can and do cherry-pick customers based on regulatory arbitrage opportunities

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<sup>69</sup> *Telecom*, COMMUNICATIONS DAILY (Feb. 13, 2002).

<sup>70</sup> As noted above, it is possible that a CETC may add facilities to the UNE loops that it leases, but any effect of such loop investment on reportable costs would likely be negligible. See *Meade Affidavit*, at ¶¶ 7-9.

rather than on fundamental economics.<sup>71</sup> The operation of the Commission's high-cost rules, along with state policies and developments in the marketplace, have had inadvertent consequences that – if allowed to continue – seriously distort the marketplace and actually could derail efficient competition and harm consumers.

**C. FCC Recognition That CETC Arbitrage Violates The Act**

In its *Rural Task Force Order*, the Commission adopted a national disaggregation rule expressly to reduce the possibility for arbitrage of universal service support resulting in shortfalls or windfalls to either competitors or rural ILECs.<sup>72</sup> The Commission noted that disaggregation of support would help to prevent unintended windfalls to CETCs that might otherwise occur if support were averaged across a study area.<sup>73</sup> The Commission acknowledged that a CETC otherwise had an incentive to seek out those instances with below-average costs and “cream skim” averaged support.<sup>74</sup> As it explained in its *Rural Task Force Order*, per-line costs are not consistent throughout a study area; in fact, the costs of service for different customers within the same study area may vary greatly.<sup>75</sup> Therefore, under the Commission's prior support mechanism, which provided uniform support through the study area of a rural carrier, there was

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<sup>71</sup> *Rural Task Force Order*, at ¶ 145 (noting support would be available to a competitor serving only the low-cost urban lines in a study area); *see also* 47 U.S.C. § 214(e)(5) (allowing states and Commission to approve a “service area” different from a “study area”).

<sup>72</sup> Rural Task Force, “Disaggregation and Targeting of Universal Service Support,” White Paper 6, at 6 (Sept. 2000), *available at* <http://www.wutc.wa.gov/rtf>.

<sup>73</sup> *See Petition for Agreement with Designation of Rural Company Eligible Telecommunications Carrier Service Areas and for Approval of the Use of Disaggregation of Study Areas for the Purpose of Distributing Portable Universal Service Support*, 15 FCC 9921 (rel. Sept. 9, 1999) (approving request by the Washington Utilities and Transportation Commission to use Benchmark Cost Proxy Model (BCPM) as guide for assigning support to density zones).

<sup>74</sup> *Id.* at ¶ 12.

<sup>75</sup> *Rural Task Force Order*, at ¶¶ 138, 145.

the risk of uneconomic incentives and barriers to competitive entry (*i.e.*, “artificial barriers to competitive entry in the highest-cost areas and artificial entry incentives in relatively low-cost portions of a rural carrier’s study area”), which the Commission feared “could result in support not being used for the purpose for which it was intended, in contravention of section 254(e).”<sup>76</sup> For example, according to the Commission, “support would be available to a competitor that serves only the low-cost urban lines, regardless of whether the support exceeds the cost of any of the lines.”<sup>77</sup>

To prevent these economic distortions in the marketplace, and to promote the principles of specificity, predictability and competitive neutrality, the Commission determined that it was necessary for support to be disaggregated and targeted. The Commission said, the per-line level of support “will be distributed in a manner that ensures that the per-line level of support is more closely aligned with the cost of providing service.”<sup>78</sup> For the same reason, the Commission should ensure that CETCs do not receive HCLS when their loop costs are below the national high-cost standard. Failure to correct this irregularity gives CETCs improper incentives to serve customers where UNEs are available even if they would not otherwise be as efficient a provider as the ILEC.

#### **D. The Certification Requirement and Enforcement Options**

The Commission has broad authority to enforce Section 254(e) of the Act. First, the Commission has adopted a certification requirement to ensure that carriers use federal support received for the purposes for which it was intended, as required by Section 254(e) of the

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<sup>76</sup> *Id.* ¶ 145.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* As discussed, *infra* page 30-32, however, disaggregation does not protect against regulatory arbitrage when UNE prices are set artificially low.

Act and Section 54.7 of the Commission's rules.<sup>79</sup> ACS-F seeks a declaratory ruling to clarify the obligations of CETCs before they improperly receive – and USAC improperly pays out – high-cost support.

**1. Rather than Wait for Complaints to be Brought, the FCC Should Issue a Declaratory Ruling**

ACS-F notes that the Commission has broad authority to issue a declaratory ruling to terminate controversy or remove uncertainty,<sup>80</sup> and this would seem a more efficient use of Commission, state and carrier resources than a litigation-type proceeding. Therefore, the Commission should find, as a matter of law, that a CETC providing service via UNE loops cannot make the certification required by Sections 54.313 and 54.314 of its rules if it is able to purchase loops at an amount which does not meet the high-cost loop standard established in Section 36.631 of the Commission's rules.

**2. USAC Is Required to Look to the Commission for Interpretation of Rules that Lack Clarity**

The Commission has appointed USAC as the permanent Administrator of the federal universal service support mechanisms, including all high-cost support.<sup>81</sup> USAC, as its name implies, is merely an administrator of universal service funds, and the Commission's rules

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<sup>79</sup> This requirement was imposed first for non-rural carriers, see *Federal-State Joint Board on Universal Service*, 14 FCC Rcd 20432, ¶¶ 97-99 (1999) (“*Ninth Report and Order*”) and subsequently for rural carriers, see *Rural Task Force Order* at ¶ 187. See also 47 C.F.R. § 54.313 (certification requirement for non-rural carriers); § 54.314 (certification requirement for rural carriers). The Commission therefore adopted rules requiring states that wish to receive federal high-cost support for carriers within their boundaries to *certify* to the Commission, annually, that all federal high-cost funds flowing to ETCs in that state are being used in a manner consistent with Section 254(e). *Ninth Report and Order* at ¶ 97.

<sup>80</sup> 47 C.F.R. § 1.2. This rule is derived from Section 5(e) of the APA, which explicitly provides that “[t]he agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.” 5 U.S.C. § 554(e).

<sup>81</sup> See 47 C.F.R. § 54.702 *et seq.*

prohibit USAC from making policy, interpreting unclear provisions of the statute or rules, or interpreting the intent of Congress.<sup>82</sup> This Petition identifies contradictory provisions governing USAC's administration of the high-cost fund for rural carriers: on the one hand Section 54.307 states that the CETC should receive high-cost support equal to the amount to which the ILEC was entitled; *but* on the other hand Section 254(e) of the Act and Section 54.7 of the Commission's rules require that such support be used only for the purpose for which the support was intended, *i.e.*, to support high-cost loops. USAC does not have authority to reconcile this conflict. In such a situation, USAC "*shall seek guidance from the Commission.*"<sup>83</sup> The declaratory ruling sought by ACS-F will provide greater certainty and help ensure that USAC does not improperly pay HCLS to a CETC that does not meet the national high-cost loop standard.

**3. The Commission Must Enjoin Payment of HCLS to GCI and Other CETCs That Serve Non-High-Cost Loops**

ACS-F has identified an ongoing violation of Section 254 of the Act and Section 54.7 of the Commission's rules through receipt by GCI of HCLS when GCI does not have high-cost loops. When any CETC receives high-cost support for non-high-cost loops, it misappropriates scarce, finite, rural cost recovery resources and gains an artificial competitive advantage over the ILEC, skewing the market and disserving the public interest. The Commission must act to end its part in authorizing these unlawful universal service payments. As explained by Commissioner Abernathy, "[the Commission] cannot rely on competition to allocate resources and maximize consumer welfare if particular entities are able to gain

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<sup>82</sup> 47 C.F.R. § 54.702 (c).

<sup>83</sup> *Id.*

advantage by violating our rules with impunity.”<sup>84</sup> The Act and the Commission’s rules grant the Commission authority to issue a declaratory ruling to end this violation. For example, Section 4(i) of the Act authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions.”<sup>85</sup> The Commission’s regulations also contemplate the issuance of declaratory rulings to terminate a controversy or end uncertainty.<sup>86</sup>

The Commission’s rules also vest in the Commission ultimate authority to enjoin the unlawful disbursement of universal service funds. Decisions issued by USAC may be challenged under Sections 54.719 *et seq.* of the Commission’s rules. Under these provisions, any person aggrieved by an action of a USAC division, board committee, or board of directors may seek review from the Commission within thirty days of the issuance of the decision that is to be reviewed.<sup>87</sup>

Pursuant to Section 54.725(b) of the Commission’s rules, where a party has sought review of a USAC action, USAC “*shall not disburse support to a service provider until a final decision has been issued . . .* ; provided, however, that [USAC] may disburse funds for any

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<sup>84</sup> *My View from the Doorstep of FCC Change*, Address to the Indiana University by Commissioner Kathleen Q. Abernathy, March 4, 2002, *available at* <http://www.fcc.gov/speeches/Abernathy/2002/spkg206.html>.

<sup>85</sup> 47 U.S.C. 154(i).

<sup>86</sup> 47 C.F.R. § 1.2.

<sup>87</sup> *See* 47 C.F.R. § 54.719 (parties permitted to seek review, which allows party to seek review either within USAC or from the Commission) and § 54.720 (filing deadlines; where a party first files a request for review with USAC, the time period for seeking review from the Commission shall be tolled). Generally, a request for review submitted to the Commission shall be considered and acted upon by the Common Carrier Bureau (now Wireline Competition Bureau), although requests that raise novel questions of fact, law or policy shall be considered by the full Commission. *Id.* § 54.722.

amount of support that is not the subject of an appeal.”<sup>88</sup> While ACS-F does not have any information about when USAC issues its “decision” to pay HCLS to GCI, ACS-F believes it is nevertheless incumbent upon the Commission to act to end the unlawful misuse of the universal service high-cost funds, as clearly anticipated by the Act and the Commission’s rules.

Similarly, Section 208 of the Act authorizes the Commission to address suspected or alleged violations of Section 254(e) of Act. The Commission has held that it has the authority to take enforcement action *against a carrier* that it believes has misapplied its high-cost support, and that states or other parties could petition the Commission, or bring a formal complaint pursuant to Section 208 of the Act, to bring any alleged misapplication of federal high-cost support before the Commission.<sup>89</sup>

The foregoing statutes and regulations demonstrate that Congress and the Commission have already determined that the Commission has the authority to enjoin unlawful payments of high-cost support by USAC. ACS-F submits that the Commission should issue a declaratory ruling immediately to end this misuse of rural carrier cost recovery and preserve the integrity of the universal service fund and efficient competition.

#### **IV. CETCS’ UNLAWFUL RECEIPT OF HIGH-COST FUNDING FOR NON-HIGH-COST LOOPS DISSERVES THE PUBLIC INTEREST**

Where CETCs are providing local service via UNEs priced at state-approved levels, their loop prices are readily knowable, and there can be no doubt about the cost of their lines or whether it is greater or less than the FCC’s high cost standard. The FCC has a statutory obligation to consider whether the CETC is using high-cost loop support to support high-cost lines. The CETC has the responsibility to make available whatever information is necessary, to

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<sup>88</sup> *Id.* § 54.725(b) [emphasis added].

<sup>89</sup> *See Rural Task Force Order* at ¶ 192 & n.453; *see also Ninth Report and Order*, at ¶ 110.